



The State Bar *of California*

OPEN SESSION AGENDA ITEM 54-121 MARCH 2019 REGULATION AND DISCIPLINE COMMITTEE II.D

DATE: March 15, 2019

TO: Members, Regulation and Discipline Committee
Members, Board of Trustees

FROM: Antonia G. Darling, Chief Court Counsel/Chief Court Administrator
State Bar Court

SUBJECT: Technical Corrections to Rules of Procedure 5.152, 5.65.1 and 5.342: Request for Approval

EXECUTIVE SUMMARY

In the process of updating the Rules of Procedure to integrate certain parts of the Rules of Practice (Board Agenda item 54-122 SEPTEMBER 2018), we discovered that a portion of rule 5.152 of the Rules of Procedure was inadvertently deleted in the draft. We also discovered several terminology errors were contained in existing rules 5.65.1 and 5.342 of the Rules of Procedure. In order to avoid confusion, make clear that page limits were not eliminated, and correct the inconsistent terminology, we request that the following technical amendments be approved. None are substantive, but all are more than typographical errors; therefore, approval of the Board of Trustees is required to allow the court staff to make the corrections. We do not believe they are required to be sent out for public comment.

BACKGROUND

Following a lengthy process of reviewing all the existing Rules of Practice, comparing them with the Rules of Procedure, and considering the most efficient way to combine them, we presented an agenda item, in May 2018, asking that the proposed integration of most of the Rules of Practice into the Rules of Procedure be sent out for public comment. This was approved and the proposed changes to the Rules of Procedure were posted for public comment. In September 2018, the proposed rule changes were returned from public comment with no objections and the amendments were approved by the Board of Trustees. During that period,

numerous other amendments to the Rules of Procedure were approved by the Board of Trustees as well. During the preparation of the revised rules, we discovered that part of rule 5.152 of the Rules of Procedure (Appellant's Brief) was inadvertently shown as being deleted. This was an error.

Additionally, we identified incorrect terminology had been used in the Rules of Procedure (1) rule 5.65.1 (Expert Disclosure / Discovery) – using “order” instead of “rule;” and (2) rule 5.342 (Interim Suspension or Involuntary Active Enrollment) – using “active” instead of “inactive” and “licensee” instead of “attorney.” This agenda item seeks authority to correct these errors immediately.

DISCUSSION

Rule 5.152

The existing language in rule 5.152(B) (Appellant's Brief) contained a sentence that set the maximum page length of a brief at 30 pages without prior approval of the court. This language was inadvertently omitted when the language from rule 1320 of the Rules of Practice was added to the existing language. In the agenda item, there was no discussion of eliminating such a necessary provision, and the court did not intend to delete it. Rule 5.152(B) should therefore read as follows:

(B) Format of Brief. Each point in a brief shall appear separately under an appropriate heading, with subheadings if desired. The statement of any matter in the record shall be supported by appropriate reference to the record, including the name of any document referred to and the specific page thereof.

Unless otherwise ordered by the Presiding Judge, the brief must not exceed 30 pages, exclusive of pages containing the table of contents, tables of citations and any addendum containing statutes, rules, regulations or similar materials.

Every brief in excess of 10 pages shall be prefaced by a topical index of its contents and a table of authorities, separately listing cases, statutes, court rules, constitutional provisions, and other authorities.

Rule 5.65.1(A)

In proofreading the rules for publication, it was discovered that in rule 5.65.1(A) (Expert Disclosure/Discovery) the text references complying with this “order,” when it is clear from the context that it should refer to complying with the rule itself. It should therefore read as follows:

(A) Failure to comply with the provisions of this rule ~~order~~, including the referenced sections, may result in the exclusion at trial of proffered expert testimony.

Rule 5.342

The proofreader also noted terminology errors in rule 5.342 (Interim Suspension or Involuntary Active Enrollment). In two places the rule refers to “involuntary active enrollment,” when the context and logic show it must mean “involuntary inactive enrollment.” And finally the word “licensee” is used, when all other references were changed from “member” to “attorney.” So to be consistent and avoid confusion, this reference should also be changed. The rule should therefore read:

(A) Review Department Examination. The Review Department will examine the record of conviction or sentence of incarceration for 90 days or more:

(1) If any ground for suspension set forth in Business and Professions Code § 6102(a) is present, the Review Department may interimly suspend the attorney until a further order of the Review Department or until final disposition of the conviction proceeding.

(2) If any ground for involuntary inactive ~~active~~ enrollment set forth in Business and Professions Code § 6007(c)(5) is present, the Review Department shall order involuntary inactive ~~active~~ enrollment and order the attorney to comply with rule 9.20 of the Rules of Court.

(F) Eligibility After Order for Involuntary Active Enrollment. An attorney ~~licensee~~ who has been transferred to inactive enrollment under § 6007(c)(5) may petition for transfer to active enrollment, with or without interim remedies, pursuant to Chapter 7, rules 5.240 – 5.253.

Because each of these corrections do not change the rule or practice and will resolve potential confusion, these technical amendments should be approved by the Board of Trustees without the need for public comment.

FISCAL/PERSONNEL IMPACT

None

RULE AMENDMENTS

Title 5, Division 3, Rule of Procedure 5.152

Title 5, Division 2, Chapter 3, Rule of Procedure 5.65.1

Title 5, Division 6, Chapter 2, Rule of Procedure 5.342

STRATEGIC PLAN GOALS & OBJECTIVES

Goal: 2. Ensure a timely, fair, and appropriately resourced admissions, discipline, and regulatory system for the more than 250,000 lawyers licensed in California.

RECOMMENDATIONS

It is recommended that the Regulation and Discipline Committee and Board of Trustees approve the following resolution:

RESOLVED, that the Board of Trustees hereby adopts the technical amendments to Rules 5.152, 5.65.1 and 5.342 of the Rules of Procedure of the State Bar, as set forth in Attachment A; and it is

FURTHER RESOLVED, that the amendments to the Rules of Procedure of the State Bar are effective March 15, 2019.

ATTACHMENT(S) LIST

- A.** Proposed language of Rules 5.152, 5.65.1 and 5.342 (Clean version)
- B.** Proposed language of Rules 5.152, 5.65.1 and 5.342 (Redline version)

ATTACHMENT A

Proposed Revised Rules of Procedure 5.152, 5.65.1 and 5.342

Clean version

Rule 5.65.1 Expert Disclosure/Discovery

Unless otherwise ordered by the court, each case is to be treated as though each side has made a timely and valid demand for the exchange of information concerning expert witnesses pursuant to Code of Civil Procedure (CCP) § 2034.210 et seq., including demands for production of documents and to take the deposition of all disclosed experts, and is subject to the following procedures and deadlines:

- (B)** The date for the exchange of expert information will be the last court day at least 50 days prior to the first scheduled trial date in the case. At the time of such exchange, any party wishing to call or question a witness as an expert witness for purposes of the trial of this matter must disclose in writing the name of each such witness. Such disclosure shall include for each such witness, all of the information specified in CCP § 2034.260 and copies of all of the documents described in CCP § 2034.270. If a party does not intend to offer expert testimony at trial at the time of this initial disclosure deadline, such party shall nonetheless comply with CCP § 2034.260(b)(2) by providing a written statement that such party does not presently intend to offer the testimony of any expert witness.
- (C)** On or before 30 days prior to the first scheduled trial date in the case, a party may disclose a rebuttal expert to an expert disclosed by the other side, as provided in CCP § 2034.280.
- (D)** All parties are authorized to take the deposition of any disclosed expert witness pursuant to the provisions of CCP §§ 2034.410–2034.470. However, any such deposition must be completed by the close of business 10 days prior to the scheduled trial date in the case.
- (E)** The expert disclosures made by any party pursuant to CCP §§ 2034.260 and/or 2034.280 (but not the materials produced pursuant to CCP § 2034.270) must be served on the opposing party and filed with this court on or before the respective deadlines for such disclosures, as set forth above.
- (F)** Failure to comply with the provisions of this rule, including the referenced sections, may result in the exclusion at trial of proffered expert testimony.

Eff. January 1, 2019.

Rule 5.152 Appellant's Brief

(A) Time to File. Within 45 days after the request for review is served or the Clerk serves the trial transcript, whichever occurs later, the appellant must file and serve an opening brief.

(B) Format of Brief. Each point in a brief shall appear separately under an appropriate heading, with subheadings if desired. The statement of any matter in the record shall be supported by appropriate reference to the record, including the name of any document referred to and the specific page thereof.

Unless otherwise ordered by the Presiding Judge, the brief must not exceed 30 pages, exclusive of pages containing the table of contents, tables of citations and any addendum containing statutes, rules, regulations or similar materials.

Every brief in excess of 10 pages shall be prefaced by a topical index of its contents and a table of authorities, separately listing cases, statutes, court rules, constitutional provisions, and other authorities.

(C) Factual Issues on Review. The appellant must specify the particular findings of fact that are in dispute and must include references to the record to establish all facts in support of the points raised by the appellant. Any factual error that is not raised on review is waived by the parties.

(D) Failure to File Brief. Unless otherwise ordered by the Presiding Judge, if the opening brief is not filed, the Clerk will notify the parties that the brief must be filed within five days after the Clerk's notice is served or:

- (1) The request for review will be dismissed with prejudice; and
- (2) If no other party requested review, the hearing judge's decision will become the State Bar Court's final decision.

Eff. January 1, 2011; Revised January 1, 2019.

Rule 5.342 Interim Suspension or Involuntary Active Enrollment

(A) Review Department Examination. The Review Department will examine the record of conviction or sentence of incarceration for 90 days or more:

- (1) If any ground for suspension set forth in Business and Professions Code

§ 6102(a) is present, the Review Department may interimly suspend the attorney until a further order of the Review Department or until final disposition of the conviction proceeding.

(2) If any ground for involuntary inactive enrollment set forth in Business and Professions Code § 6007(c)(5) is present, the Review Department shall order involuntary inactive enrollment and order the attorney to comply with rule 9.20 of the Rules of Court.

- (B) **Filing and Responding to Briefs.** Within 10 days after the initial record of conviction or sentence of incarceration for 90 days or more is served, either party may file a brief addressing whether grounds for interim suspension under § 6102(a) or grounds for involuntary active enrollment under § 6007(c)(5) are present. The brief may include evidence from the record of the proceedings resulting in the conviction or sentence of incarceration, including a transcript of any testimony. The opposing party has 10 days after the brief is served to file and serve a written response.
- (C) **Misdemeanor Conviction and Moral Turpitude.** In cases involving misdemeanor convictions, the Review Department, on its own or on motion of any party, may direct the Hearing Department to conduct a hearing for the sole purpose of resolving factual issues as to whether there is probable cause to believe that the conviction involved moral turpitude, and if found, to make a recommendation whether interim suspension should be imposed. Proceedings pursuant to this subsection will be conducted as follows:
- (1) the Court may allow discovery only if good cause is shown;
 - (2) within 30 days after the referral order, each party must file and serve:
 - (a) a list of all witnesses to be called at the hearing, except for impeachment or rebuttal; and
 - (b) copies of all exhibits to be offered.
 - (1) a hearing will be held within 45 days after the referral order is served. The court will file and submit its report to the Review Department within 15 days after the hearing concludes.
 - (2) rules 5.80-5.86 do not apply to these proceedings. If an attorney fails to appear at the hearing in person or by counsel, the hearing will proceed unless the court continues it for good cause.
 - (3) a recommendation for interim suspension is reviewable under rule 5.150.
- (D) **Motion to Vacate, or to Delay or Stay Order for Interim Suspension for Interim Suspension or Involuntary Active Enrollment.** At any time while a conviction proceeding is pending in the State Bar Court, an attorney may file a motion in the Review Department to vacate, delay the effective date of, or temporarily stay the effect of an order of interim suspension. Rule 5.162 of these rules governs the motions.

- (E) **Review of Order for Involuntary Active Enrollment.** An order granting or denying involuntary active enrollment under § 6007(c)(5) is reviewable under rule 5.150.
- (F) **Eligibility After Order for Involuntary Active Enrollment.** An attorney who has been transferred to inactive enrollment under § 6007(c)(5) may petition for transfer to active enrollment, with or without interim remedies, pursuant to Chapter 7, rules 5.240 – 5.253.

ATTACHMENT B

Proposed Revised Rules of Procedure 5.152, 5.65.1 and 5.342

Redline version

Rule 5.65.1 Expert Disclosure/Discovery

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- (D) The expert disclosures made by any party pursuant to CCP §§ 2034.260 and/or 2034.280 (but not the materials produced pursuant to CCP § 2034.270) must be served on the opposing party and filed with this court on or before the respective deadlines for such disclosures, as set forth above.

Failure to comply with the provisions of this rule order, including the referenced sections, may result in the exclusion at trial of proffered expert testimony.

Eff. January 1, 2019.

Rule 5.152 Appellant's Brief

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